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## Court Review: Volume 43, Issue 4 – Breaking News: Miller is Distinguishable from Branzburg

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# Breaking News:

## *Miller is Distinguishable from Branzburg*

Levon Q. Schlichter

**A**midst a fog of political divisiveness, Judith Miller found herself in the untenable situation of having to breach the journalists' code of ethics, as well as her own personal promise of confidentiality, or go to jail. According to the government, she had obtained illegally disclosed information from a high-ranking member of President George W. Bush's administration. Eventually, a grand jury issued Miller a subpoena that directed her to breach her promise of confidentiality by revealing the identity of her source. Miller claimed that she had a First Amendment right to withhold her confidential information from the grand jury. The court disagreed and, although she never published the information, Miller was sent to jail as punishment for protecting her source.

If nothing else, Judith Miller's 85-day-prison term put America on notice of the alarming rate at which the government is using its unbridled subpoena power to splinter the press's traditional role as the public's government watchdog. In fact, the government is currently issuing subpoenas upon members of the press at a rate unmatched in at least 30 years.<sup>1</sup> Additionally, the length of time that reporters are being held in prison, as punishment for honoring their covenant of confidentiality, is increasing at a similarly astonishing pace.<sup>2</sup> Remarkably, the outcome of Judith Miller's case could only encourage the government to subpoena reporters in droves.<sup>3</sup> As the government is steadily increasing its use of subpoenas on reporters, the press's ability to gather and disseminate information of public concern is simultaneously weakening.<sup>4</sup>

Arguably, the scope of a reporter's privilege should directly correlate with the nature of the proceeding through which the movant attempts to compel disclosure. Courts generally adhere to this principle, reasoning that the moving party's countervailing interests differ in degree between civil, criminal, and grand jury proceedings. For instance, in a criminal proceeding, the movant/defendant who seeks to compel disclosure from a reporter has countervailing Fifth and Sixth Amendment rights to this information.<sup>5</sup> Conversely, a movant/defendant who seeks to compel disclosure from a reporter in a civil proceeding

does not have a competing constitutional right to the information.<sup>6</sup> Thus, a reporter's privilege is generally broader in civil proceedings than in criminal ones.

Interestingly, the efficacy of a grand jury's right to compel a reporter to disclose confidential information falls somewhere between the criminal and civil contexts. In our society, the grand jury "serves the invaluable function . . . of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."<sup>7</sup> Although a grand jury is constitutionally mandated, it does not have a constitutional right to a reporter's confidential information.<sup>8</sup> Thus, this article will explore only the proper scope of a reporter's privilege to withhold confidential information from a grand jury.

### I. OVERVIEW

#### A. The Supreme Court's Analysis

*Branzburg v. Hayes*<sup>9</sup> is the only Supreme Court case that has precisely addressed the scope of a reporter's privileged right to withhold confidential information from a grand jury. In *Branzburg*, the majority held that, absent a showing that the grand jury is conducting a bad-faith investigation, the First Amendment does not vitiate a reporter's legal obligation to testify in front of a grand jury.<sup>10</sup>

In *Branzburg*, the Court consolidated three separate cases where the reporters were asserting their right to withhold privileged information from a grand jury investigation. In all three of the cases, the reporters' ability to gather news of public concern was conditioned on the reporters' promise to keep certain information confidential. In the first case, the grand jury was seeking to compel disclosure of the reporter's source after two separate stories were published; the first story was about the illegal synthesizing of hashish from marijuana and the second story reported on the local drug scene. In the other two consolidated cases, the grand juries were seeking to compel the reporters to disclose information about the suspected illegal activity of the Black Panther Party. After hear-

### Footnotes

1. Elizabeth Fernandez, *Reporters Handcuffed in New Era They Fear Jailing of Journalist Will Prompt Sources to Clam Up*, S.F. CHRONICLE, July 7, 2005, at A1.
2. See Reporters Comm. for Freedom of the Press, <http://www.rcfp.org/jail.html> (listing relevant information regarding reporters who have spent time in prison on contempt charges since 1984).
3. Katherine Q. Seelye, *Journalists Say Threat of Subpoena Intensifies*, N.Y. TIMES, July 4, 2005, at § C.
4. See e.g. Seth Sutel, *Legal Pressure Prompts Anxiety Among Sources*, MIAMI HERALD, Oct. 25, 2004, at A3 (reporting two examples of

sources refusing to provide newsworthy information out of fear that a subpoena would disclose their identity).

5. United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988).
6. Zerilli v. Smith, 656 F.2d 705, 711 (D.C. App. 1981).
7. Branzburg v. Hayes, 408 U.S. 665, 688 n.23 (1972).
8. Karl H. Schmid, *Reporter's privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999*, at 39 AM. CRIM. L. REV. 1441, 1499 (2002).
9. 408 U.S. 665 (1972).
10. Branzburg, 408 U.S. at 707-08.

ing these three separate cases below, the outcomes in the circuit courts were inconsistent and, thus, the Supreme Court granted *certiorari*.<sup>11</sup>

Writing for the majority in *Branzburg*, Justice White held that, absent a showing of bad faith or harassment by the grand jury, the Constitution does not grant a reporter any privilege to withhold information from a grand jury investigation. Justice White premised the Court's conclusion on the notion that rejecting the reporters' privilege would not forbid or restrict the press's use of confidential sources.<sup>12</sup> Accordingly, the Court did not review the reporter's claim under heightened scrutiny.

Initially, the Court articulated the dual purpose of a grand jury within our government. First, a grand jury must determine whether there is probable cause to believe that a suspected person has committed a crime; and, second, it is designed to protect innocent citizens from "unfounded criminal prosecution."<sup>13</sup> Furthermore, the Court concluded that grand juries are both constitutionally mandated and deeply "rooted in long centuries of Anglo-American history."<sup>14</sup> Therefore, according to the Court, a grand jury's investigative powers are necessarily broad, including its ability to subpoena witnesses material to its task.

After providing this backdrop, the majority rejected the reporters' contention that denying them a First Amendment privilege to protect confidential sources would significantly deter informants from providing reporters with confidential information in the future. Specifically, the majority explained that the reporters' proffered evidence in support of their asserted privilege merely showed that reporters rely on confidential sources and not that the majority's holding would unconstitutionally chill future informants from disclosing confidential information. Furthermore, the Court stated that the data was unpersuasive because it included opinion polls on this subject, which were highly speculative and completed by self-serving reporters. Thus, the Court concluded, "We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his."<sup>15</sup> Ultimately, the Court found that it did not need to recognize a reporter's privilege in order to protect the press's ability to gather news and, therefore, the press's right to withhold information from a grand jury was no greater than an average citizen's.

Alternatively, Justice Stewart's dissent proposed a classic balancing test designed to ensure that every reporter's assertion of a constitutional privilege is determined on the facts of the case. The dissent's balancing test proposed that, before attempting to compel a reporter to disclose confidential information to a grand jury, the government must:

(1) show that there is probable cause to believe that

the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.<sup>16</sup>

**Justice White held that, absent a showing of bad faith or harassment . . . , the Constitution does not grant a reporter any privilege to withhold information from a grand jury investigation.**

Therefore, the dissent's approach differed from the majority's because it opined that limiting the scope of the reporters' privilege to cases of bad faith or harassment would unconstitutionally infringe on the press's First Amendment right to gather news.

Similarly, the dissent contended that the majority's rule would cause future confidential informants to withhold information from the press. Justice Stewart's dissent emphasizes the notion that a flexible reporter's privilege is necessary to protect the newsgathering process and, thus, to promote the free flow of information that the First Amendment was meant to ensure. In contrast to the majority, Justice Stewart believed that the Court's limitation of a reporter's privilege would have a significant chilling effect, thereby suppressing the free flow of information.

Notably, Justice Powell wrote a concurrence to "emphasize what seem[ed] to [him] to be the limited nature of the Court's holding."<sup>17</sup> According to Justice Powell, the *Branzburg* holding was not as formalistically rigid as it may appear. Instead, Justice Powell stated that a reporter has a remedy against compelled grand jury testimony where the reporter asserts any one of the following claims: (1) the grand jury is conducting its investigation in bad faith; (2) the reporter's confidential information has too remote and tenuous a relationship to the grand jury's investigation; or (3) "if [the reporter] has some other reason to believe that his testimony implicates [a] confidential source relationship without a legitimate need of law enforcement."<sup>18</sup> According to Justice Powell's concurrence, if the reporter asserts one of these claims, then the court must balance the reporter's freedom of press interest against the "obligation of all citizens to give relevant testimony with respect to criminal conduct."<sup>19</sup>

## **B. The Judith Miller Case**

Three decades after the Supreme Court's decision in *Branzburg*, the United States Court of Appeals for the District

11. *Id.* at 679.

12. *Id.* at 681.

13. *Id.* at 686-87.

14. *Id.* at 687, 690 (citations omitted).

15. *Id.* at 695.

16. *Id.* at 743 (Stewart, J., dissenting).

17. *Id.* at 709 (Powell, J., concurring).

18. *Id.*

19. *Id.*

**Judge Tatel proposed that “reason and experience dictate a [qualified] privilege for reporters’ confidential sources.”**

of Columbia Circuit heard *In re: Grand Jury Subpoena, Judith Miller*.<sup>20</sup> In actuality, the events leading up to *Miller* began when Joseph Wilson, a former ambassador of the United States, wrote a *New York Times* op-ed piece claiming that President Bush knowingly misled the American public about the presence of weapons of mass destruction in Iraq.<sup>21</sup>

Apparently, in an attempt to discredit Wilson, someone within the White House informed members of the press, including Miller, that Wilson’s wife, Valerie Plame, was a CIA agent.<sup>22</sup> Thereafter, the *Chicago Sun-Times* reported Plame’s identity in an article that challenged the accuracy of Wilson’s conclusions.<sup>23</sup>

In response, a grand jury subpoenaed Judith Miller in order to determine whether a government agent had illegally disclosed Plame’s identity as a CIA official. Interestingly, Miller had not even published the information the grand jury sought.<sup>24</sup> In any event, she refused to comply with the grand jury subpoena and, therefore, the district court held her in contempt of court. Miller challenged the grand jury’s power to compel disclosure of this information as a violation of her First Amendment rights. Significantly, Miller’s First Amendment challenge required the court to revisit *Branzburg*.

The majority began its opinion by observing that *Branzburg* controlled Judith Miller’s First Amendment claim and that, in *Branzburg*, the Supreme Court unequivocally held that the First Amendment does not provide a reporter’s privilege, absent a showing of bad faith or harassment.<sup>25</sup> Thus, the *Miller* court pressed the reporter to distinguish her case from *Branzburg*. The reporter failed to offer any distinguishing facts, and even upon independent contemplation the *Miller* court was unable to find an adequate distinction. Instead, the

reporter contended that the Constitution protected her from testifying in front of the grand jury because *Branzburg* was a plurality decision and, therefore, Justice Powell’s concurrence was binding. However, the *Miller* court adamantly rejected the reporter’s argument and concluded that Justice Powell both joined and agreed with the majority’s decision.<sup>26</sup>

In a concurring opinion, Judge Tatel concluded that *Branzburg* merely foreclosed the reporter’s privilege pursuant to the First Amendment. However, he quoted language in *Branzburg* that recognized Congress’s power to enact a qualified statutory reporter’s privilege.<sup>27</sup> Thus, he concluded that *Branzburg* did not intend to absolutely foreclose a reporter’s protection from compelled disclosure, absent a showing of bad faith or harassment. Furthermore, Tatel stated that after *Branzburg*, Congress enacted Rule 501 of the Federal Rules of Evidence, which created a qualified reporter’s privilege.<sup>28</sup>

Judge Tatel proposed that “reason and experience dictate a [qualified] privilege for reporters’ confidential sources.”<sup>29</sup> First, he noted that “reporters ‘depend upon an atmosphere of confidence and trust.’”<sup>30</sup> Therefore, denying a qualified privilege would create a chilling effect. Second, Tatel contended that the resulting benefit of denying any qualified privilege would be modest. Lastly, he stated that legal developments since *Branzburg*, including the trend among the states towards recognizing a reporter’s privilege, provided a basis to depart from *Branzburg*.

Notably, Tatel recognized the fact that the information sought by the grand jury related to an illegal “leak of information” rather than the commission of an extrinsic crime.<sup>31</sup> Moreover, Tatel concluded that there are circumstances where a reporter’s ability to obtain illegally disclosed information would be in the public’s interest. Thus, for public policy reasons, where a qualified reporter’s privilege is at issue, it is necessary for courts to balance the interests between the reporter and the government. According to Tatel, where the subject of the grand jury investigation concerns illegally disclosed information, the harm and news value of the leak are the dispositive factors. In conclusion, Tatel stated that “were the leak at

20. 438 F.3d 1141 (D.C. Cir. 2006) [hereinafter *Miller*]. The opinion was initially issued in 2005 with substantial redactions because of its discussion of national security materials. In *re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005). As explained in a separate opinion a year later in which the court concluded some of the redacted material could then be made public, the opinion was reissued with additional pages included, though some materials were still redacted. This article cites to the reissued opinion. In between *Branzburg* and *Miller* the circuit courts had applied the *Branzburg* rule inconsistently. Compare *Storer Communications, Inc. v. Giovan*, 810 F.2d 580, 584-85 (6th Cir. 1987) (ordering reporter to disclose to a grand jury the identity of a confidential source who was suspected of murder), and *Lewis v. United States*, 501 F.2d 418 (9th Cir. 1974) (ordering reporter to reveal information to a grand jury relating to the bombing of a government building), with *In re: Williams*, 766 F.Supp. 358, 370 (W.D. Pa. 1991), *aff’d by an equally divided court*, 963 F.2d 567, 569 (3d Cir. 1992) (quashing a grand jury subpoena that sought identity of the reporter’s source who violated a court

order by providing the reporter with copies of documents used as evidence in a criminal trial).

21. Joseph C. Wilson, Op-Ed, *What I Didn’t Find In Africa*, N.Y. TIMES, July 6, 2003, § 4, at 9.

22. Nancy Gibbs, *The Rove Problem*, TIME, July 25, 2005, at 22.

23. Robert Novak, *The Mission to Niger*, CHI SUN-TIMES, July 14, 2003, at 31.

24. *Miller*, 438 F.3d at 1144.

25. *Id.* at 1146-47.

26. *Id.* at 1148-49.

27. *Id.* at 1163-83 (Tatel, J., concurring).

28. Rule 501 became effective June 1, 1975 and provides in relevant part: “Privilege[s]...shall be governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience.” FED. R. EVID. 501.

29. *Miller*, 438 F.3d at 1166 (Tatel, J., concurring) (quoting *Jaffee v. Redmond*, 518 U.S. 1, 14 (1996)).

30. *Id.* at 1168 (citations omitted).

31. *Id.* at 1169.

**[A] narrow reporter's privilege will not significantly impede on a grand jury's function of prosecuting extrinsic crimes . . . .**

issue in [Miller] less harmful to national security or more vital to public debate, or had the grand jury's special counsel failed to demonstrate its need for the reporter's evidence" he might have felt compelled to grant Miller's motion to quash the subpoena.<sup>32</sup>

## II. DISCUSSION

The following discussion attempts to illustrate how and why *Branzburg* should not

control cases that, like *Miller*, deal with "illegal disclosures of confidential government information." Initially, it distinguishes *Miller* from *Branzburg* based on the nature of the reporters' information. Relying on this distinction, it contends that the First Amendment protects a reporter from disclosing the identity of a confidential government-agent informant. In addition, it proposes a reporter's privilege whose scope is guided by the public's interest in the reporters' information and concludes that this approach is the best way to strike a balance between the competing constitutional interests of the government and the press. It then examines *Branzburg*'s reasoning against *Miller*'s facts to support the logic of its distinction. Lastly, this section applies its proposed rule to current conflicts between the press and the government in order to demonstrate its propriety.

### A. Distinguishing *Miller* from *Branzburg*

Despite the *Miller* court's conclusory pronouncement that the case was indistinguishable from *Branzburg*, the very nature of the information sought in the two cases is distinguishable.<sup>33</sup> The confidential information sought in *Branzburg* was evidence containing the identity of self-purported drug dealers and drug users and the suspected illegal activity of a radical minority group.<sup>34</sup> On the other hand, the information sought in *Miller* related to the identity of a government official who was suspected of unlawfully leaking information regarding government activity.<sup>35</sup> Thus, *Miller* is distinguishable from

*Branzburg* because a First Amendment reporter's privilege to withhold only the identity of confidential government-agent informants will particularly foster the detection of governmental misconduct.<sup>36</sup> Additionally, such a narrow reporter's privilege will not significantly impede on a grand jury's function of prosecuting extrinsic crimes, which was of paramount concern in *Branzburg*.

Quoting *Branzburg*, the *Miller* court reasoned that a reporter's attempt to conceal a crime, via an assertion of a reporter's privilege, is unconditionally outweighed by a grand jury's good-faith interest in punishing the crime.<sup>37</sup> However, this reasoning is misplaced in the context of "illegal disclosure of confidential government information" because it does not consider the nature of the information. This distinction is necessary because "information generated from press reports about government, serves as a 'powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.'" <sup>38</sup> Therefore, the scope of a reporter's privilege should protect reporters from compelled disclosure of their confidential government-agent informants, provided that the information properly relates to an abuse of government power.

### B. The First Amendment Provides a Qualified Reporter's Privilege

It is axiomatic that the purpose of the First Amendment is to protect the public against the government's control of thoughts, behavior, and expression.<sup>39</sup> The text of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or, of the press."<sup>40</sup> Various interpretations of the disjunctive "or" have ranged from claims that it does not create any additional rights beyond freedom of speech to claims that the Press Clause provides the press with "special rights."<sup>41</sup> The Supreme Court, however, has refused to recognize that the First Amendment's disjunctive "or" creates special protections for the press.

Undeniably, the function of the press is to gather and disseminate information. Within this *raison d'être*, "the press's most important [role] is to [gather and disseminate information about] the government."<sup>42</sup> The press's ability to obtain confidential information from government officials is unques-

32. *Id.* at 1183.

33. See Monica Langley & Lee Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 14 n.7 (1988) (contending that *Branzburg* should not apply, at the very least, to cases where the reporter's information relates to the identity of a confidential government-agent source).

34. This is evidence which would likely help the grand jury to prosecute the perpetrators of an extrinsic crime.

35. This is evidence of the identity of a government-agent informant, where the only crime the grand jury is seeking to prosecute is, in fact, the informant's disclosure of confidential information.

36. *Id.* at 13.

37. *Miller*, 438 F.3d at 1147.

38. Langley & Levine, *supra* note 33, at 34 (quoting *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966)).

39. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-57 (1961).

40. U.S. CONST. amend. I.

41. See generally, John H. F. Shattuck & Fritz Byers, *An Egalitarian Interpretation of the First Amendment*, 16 HARV. C.R.-C.L. L. REV. 377, 377 (1981) (discussing various interpretations of the disjunctive within the First Amendment). Some scholars have settled on a middle ground, taking the position that the Constitution does not provide the press with "extraordinary constitutional protection" but that it does require courts to be more protective of the press's special responsibilities within our society. See e.g. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 976 (2d ed. 1988).

42. In re Ridenhour, 520 So.2d 372, 376 (La. 1988). Thus, the press is often referred to as the Fourth Estate. *Id.* at n.14.



tionably its most effective means for providing the public with information about government activity.<sup>43</sup> Accordingly, the press must have a right to keep the identity of their official government sources confidential in order to elicit information pertaining to otherwise inaccessible government activity. In this sense, “a press right to gather information is compatible with the concept of freedom of the press understood by many politicians and political theorists of the early American republic.”<sup>44</sup>

Notably, the Supreme Court has interpreted the Speech Clause broadly in order to vehemently protect an individual’s right to freedom of expression. Most often, whenever the Court extends First Amendment protection, it relies on the notion that “public discussion and debate of issues, and criticism and investigation of public bodies are essential to a free society.”<sup>45</sup> However, the ability to freely express oneself is severely impaired without the constitutionally protected right of reporters to obtain confidential government information that will likely influence public opinion. In fact, the many Supreme Court cases emphasizing the importance of an “uninhibited marketplace of ideas in which truth will ultimately prevail” implicitly rely on the speakers’ ability to obtain information that will influence their assessment of the truth.<sup>46</sup> Thus, protection of a reporter’s right to gather (and subsequently publish) confidential information is required under the First Amendment in order to protect the sanctity of our self-governing process.

### C. A Proposed Qualified Privilege with Respect to Confidential Government Sources

This article proposes a narrow rule that does not purport to grant reporters an absolute privilege in every case where a reporter has obtained illegally disclosed, confidential information from a government agent. Instead, where a reporter has received confidential information from a government-agent informant, the reporter should have a qualified privilege that protects him or her from compelled disclosure only where the reporter establishes the following two conditions: (1) the dis-

closure was related to possible government misconduct<sup>47</sup> and (2) reporting the information to the general public did not injure the nation’s military, diplomatic or national security interests or any other similarly compelling government interest. Consequently, a reporter could successfully assert a privilege only where the illegal disclosure of information, which the grand jury is seeking to punish, was in the public’s interest.

Notably, this proposed rule is similar to the standard that the Supreme Court implemented to define the scope of a presidential privilege in *United States v. Nixon*.<sup>48</sup> Applying this standard to *Miller* is logical because “any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality.”<sup>49</sup> Therefore, a reporter should have a privilege to withhold the identity of a confidential, government-agent informant from a grand jury in the limited situations where the privilege advances the public’s First Amendment interest in facilitating an effective process of self-government.<sup>50</sup>

Admittedly, the second prong of this proposed standard is difficult to clearly define and, therefore, it does not appear to provide a substantial degree of guidance for all interested parties. Nevertheless, the Supreme Court has relied similarly on a “national/public security” limitation in First Amendment cases<sup>51</sup> as well as in other areas of law.<sup>52</sup> Furthermore, as long as courts insist that the government’s “threat to national security” claim is asserted with the same level of specificity as the

**This article proposes a narrow rule that does not purport to grant reporters an absolute privilege in every case where a reporter has obtained illegally disclosed . . . information from a government agent.**

43. Shattuck & Byers, *supra* note 39, at 384-85.

44. Comment, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 U. PA. L. REV. 166, 174 (1975). However, this right does not necessarily amount to a “special right.” See Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 328 (2004) (recognizing “some right . . . for information-gathering activities to a manageable subset of our society that the general public relies on to gather and disseminate important information to it [should be determined] by focusing on the recognized functions that certain groups perform for society, instead of on the perceived inequities in allowing some groups to invoke constitutional rights not available to individual citizens”).

45. James A. Guest & Alan L. Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 N.W. L. REV. 18, 30 (1969).

46. Comment, *supra* note 44, at 175.

47. The term “possible government misconduct” is intended to include not only allegations that the government has violated an existing criminal or civil law but also situations where the government is acting secretly under a claim of authority that is sus-

pect. See *infra* notes 82-89 for examples of recent events where the government has acted under a suspect claim of authority.

48. 418 U.S. 683, 706 (1974). Thus, the president has a First Amendment privilege to withhold confidential information from a court only where disclosure of the information would be “injurious to the public interest.” *Id.* at 713.

49. Langley & Levine, *supra* note 33, at 38-39 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 (Brennan, J., concurring)).

50. In *Nixon*, the Supreme Court stated that the scope of a presidential privilege is necessarily determined by a rule which preserves the essential function of each competing branch of government. *Nixon*, 418 U.S. at 707. Considering that the press has been recognized as the fourth branch of government, the same reasoning should apply to the scope of a reporter’s privilege. See *Ridenhour*, 520 So. 2d at 376 n.14 (explaining that the press’s role of watching the government is analogous to the function of a fourth branch of government).

51. See e.g. *New York Times v. United States*, 403 U.S. 713 (1971).

52. *Hamdi v. Rumsfeld*, 524 U.S. 507 (2005); *Nixon*, 418 U.S. at 706.

reporter's claim of "possible government misconduct," then certain underlying principles will emerge to help clarify the second prong's limitations. Most importantly, however, the difficulty in administering this proposed rule is not an adequate reason for abandoning well-established First Amendment objectives.

Notably, the *Branzburg* Court rejected an application of heightened scrutiny because it would have required courts to "distinguish [. . .] between the value of enforcing different criminal laws."<sup>53</sup> The Court stated that "[b]y requiring testimony from a reporter in investigations involving some crimes but not in others, [courts] would be making a value judgment that a legislature had declined to make . . ."<sup>54</sup> However, this proposed rule applies only to "illegal disclosures of information."<sup>55</sup> Accordingly, the proposed scope of this reporter's privilege is not controlled by the classification of the underlying crime that the grand jury is investigating, but rather is controlled by the public value of the illegal disclosure. Considering that this proposed rule is designed to prevent the government from abusing its power, *Branzburg*'s approach of blindly deferring to the other branches of government is patently ineffective.

#### D. Applying *Branzburg*'s Reasoning to *Miller*'s Facts

Preliminarily, *Branzburg* recognized that reporters have certain First Amendment rights to gather news.<sup>56</sup> Unfortunately, however, the *Branzburg* Court failed to elaborate on the extent of those rights and as a result it appears to propose that a reporter's constitutionally protected right to withhold confidential information exists only where the grand jury's interests stem from bad faith or harassment. However, "[i]f . . . *Branzburg* only requires balancing where a grand jury subpoena is issued in bad faith or for purpose of harassment, no balancing test would ever be required: [Any individual's] legitimate First Amendment interest would always outweigh a subpoena issued in bad faith or harassment."<sup>57</sup> Therefore, a strict interpretation of the *Branzburg* majority's rule, which the *Miller* court applied, results in an illusory rule that pretends to provide a reporter with protection from compelled disclosure in form, but provides little protection in function.<sup>58</sup> Accordingly, Justice Powell's concurring opinion logically, as he expressed, clarified and broadened the majority's scope of a reporter's privilege.

Significantly, the *Branzburg* majority rejected the reporters' asserted privilege under the First Amendment. The Court relied primarily on the following two factors before reaching this conclusion: (1) the case did not implement the reporters' First Amendment right to gather news; and (2) its decision promoted the grand jury's purpose of protecting the public's interest. Interestingly, based on these factors, *Branzburg*'s reasoning is misplaced in the context of the *Miller* facts.

**[T]he proposed scope of this reporter's privilege is not controlled by the classification of the underlying crime . . . , but rather . . . by the public value of the illegal disclosure.**

First, the *Branzburg* Court rejected the reporters' First Amendment claim by relying heavily on the notion that "the case did not present an issue of *restricting the press from using confidential sources*."<sup>59</sup> In fact, in the process of rejecting the proposition that the First Amendment "protects a newsman's agreement to conceal the criminal conduct of his source,"<sup>60</sup> the Court noted that this conclusion "involves no restraint on . . . the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources."<sup>61</sup> In reaching this conclusion, the *Branzburg* Court found that the reporters' empirical data did not prove that its decision would have a significant deterrent effect on the press's future ability to obtain confidential information. Instead, it merely showed that reporters rely on confidential informants. Nevertheless, the *Branzburg* Court did acknowledge that its rule would impose an incidental burden on the press's ability to gather news.<sup>62</sup> Notwithstanding this undetermined burden, the Court presumed that without evidence proving otherwise, its decision would not unconstitutionally chill the newsgathering process.

However, if one can accept the following four assumptions, then *Branzburg* improperly presumed that a denial of any reporter's privilege, absent a showing of bad faith or harassment, does not create a chilling effect:<sup>63</sup> (1) reporters rely on informants for news;<sup>64</sup> (2) many informants will not provide a reporter with information unless the reporter promises to keep their identity confidential;<sup>65</sup> (3) the use of unbridled subpoena

53. *Branzburg*, 408 U.S. at 705-6.

54. *Id.*

55. Considering that the rule applies only to grand jury subpoenas, it follows that this rule would apply only to communications between reporters and their sources that the government alleges are illegal.

56. *Branzburg*, 408 U.S. at 681.

57. *The New York Times Co. v. Gonzales*, 382 F.Supp.2d 457, 491 (S.D.N.Y. 2005).

58. See *Newsman's Privilege to Withhold Information from Grand Jury*, 86 HARV. L. REV. 137, 144 n.37 (1972) [hereinafter *Newsman's Privilege*] (recognizing that a reporter's ability to prove bad faith is seemingly illusory because a reporter is not likely to have access to this evidence until after the grand jury has completed its investigation).

59. *Branzburg*, 408 U.S. 681 (emphasis added).

60. This language implies that the *Branzburg* Court's decision was heavily influenced by the fact that the reporters' information could aid the grand jury's investigation of an extrinsic crime. Langley & Levine, *supra* note 33, at 20.

61. *Branzburg*, 408 U.S. at 691-92.

62. *Id.* at 695.

63. Joan Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. 57, 64-65 (1985).

64. *Branzburg*, 408 U.S. at 693-94.

65. See *e.g. Newsman's Privilege*, *supra* note 58, at 147 (noting that there is significant evidence which shows that reporters extensively rely on confidential informants).

**[T]he quantum of evidence that Branzburg demands from the reporters in order to overcome its presumption is unattainable . . . .**

power will deter informants from disclosing confidential information;<sup>66</sup> and (4) the use of unbridled subpoena power will deter reporters from publishing confidential information.<sup>67</sup> Even assuming that the existing data does not absolutely refute *Branzburg's* presumption, common sense suggests that the *Branzburg* presumption was backwards

because, all things being equal, an informant is more likely to provide a reporter with confidential information where the reporter promises that the informant's identity will remain anonymous.<sup>68</sup> Consequently, *Branzburg's* decision to compel the reporters to disclose their confidential information does burden the press's ability to gather news.<sup>69</sup>

Moreover, the quantum of evidence that *Branzburg* demands from the reporters in order to overcome its presumption is unattainable because it is almost impossible to quantify the deterrent effect.<sup>70</sup> Similarly, "the magnitude of the [burden] a privilege imposes on [the courts'] truth-seeking [function] depends on exactly the same empirically unverified factor that determines the benefit gained by a privilege: namely, the extent to which people would communicate in the absence of the privilege."<sup>71</sup> Although this empirical data is nonexistent, there is increasingly more evidence of specific instances where *Branzburg's* deterrent effect has burdened the press's ability to gather and report news.<sup>72</sup> This evidence demonstrates that the deterrent effect manifests itself most prominently between reporters and government-agent informants.<sup>73</sup> Thus, *Branzburg's* rule imposes a burden on the press's right to gather news; however, this burden is constitutionally significant only where it adversely affects the press's ability to gather information about possible government misconduct.

Second, *Branzburg* rejected the reporters' privilege in order to protect the grand jury's purpose of aiding in the detection of criminal activity. According to *Branzburg*, the grand jury's ability to fully perform this function ultimately helps to protect the

public's security. However, when the reporter's information relates to issues involving government misconduct, recognizing a reporter's privilege to protect confidential sources furthers the detection of wrongdoing.<sup>74</sup> Hence, the proposed rule set forth here attempts to provide a reporter's privilege only where it will not run contrary to the public's security interest. Meanwhile, if a reporter's privilege does not threaten the public's security, then it is presumably advancing the public's interest in a free-flow of information, which facilitates our self-governing process.

#### **E. An Actual Demonstration of How This Proposed Rule Can Co-exist with *Branzburg* to Clarify the Precise Scope of a Reporter's First Amendment Privilege**

Indeed, *Branzburg's* rule is appropriate in the arena of the facts in which it was decided because a grand jury's interest in prosecuting extrinsic crimes undoubtedly outweighs reporters' interest in protecting the identity of their confidential, non-government sources. Therefore, notwithstanding the contention that *Branzburg* does cause a chilling effect, its reasoning should support a grand jury's unbridled subpoena power only where the grand jury seeks information relating to an extrinsic crime. However, *Branzburg* should not apply where a reporter obtains confidential information from a government-agent informant for the following three reasons. First, government abuse is an evil that must be curtailed through media exposure.<sup>75</sup> Second, secrecy within the government has steadily increased since *Branzburg*.<sup>76</sup> Third, government misconduct is unlikely to be disclosed to reporters without the reporters' legitimate ability to promise confidentiality.<sup>77</sup>

Notably, *Branzburg's* analysis explicitly considered the effects that its rule would have only on the relationship between minority groups (informants) and reporters. In doing so, the Court "[bespoke] a palpable focus upon both the confidential source at issue—i.e. dissident political or cultural groups, and the [extrinsic] crimes that they had allegedly committed."<sup>78</sup> Thus, *Branzburg* concluded that denying the reporters' asserted privilege was unlikely to deter informants from disclosing confidential information to the

66. See e.g. Laura R. Handman, *Protection of Confidential Sources: A Moral, Legal, and Civic Duty*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 573, 587-88 (2005) (concluding that modern day restrictions on a reporter's privilege have a "censoring effect . . . about matters of vital public concern").

67. See e.g. *Modes of Analysis: The Theories and Justifications of Privileged Communications*, 98 HARV. L. REV. 1471, 1477 (1985) [hereinafter *Modes of Analysis*] (contending that an absolute denial of a reporter's privilege will deter reporters from gathering confidential information).

68. *Miller*, 438 F.3d at 1168 (Tatel, J., concurring).

69. See Erik W. Laursen, *Putting Journalists on Thin Ice*: McKevitt v. Pallasch, 73 U. CIN. L. REV. 293, 316 (2004) (noting that empirical data shows that subpoenas are burden to newsgathering).

70. Guest & Stanzler, *supra* note 43, at 43 n.129.

71. *Modes of Analysis*, *supra* note 67, at 1477.

72. See e.g. Robert D. McFadden, *Newspaper Withholding Two Articles After Jailing*, N.Y. TIMES, July 9, 2005, at § A (reporting that two

"profoundly important" stories of "significant interest to the public" were not published solely out of fear that the reporter would be subpoenaed); Sutel, *supra* note 4, at A3 (reporting two examples where fear of a subpoena deterred source).

73. *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 332 (1970) (citing affidavit of *Newsweek* reporter Jon Lowell).

74. Schmid, *supra* note 8, at 1463.

75. Laurence B. Alexander, *Looking Out For the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 106 (2002).

76. See *Gonzales*, 382 F.Supp. 2d at 462 n.3 (noting that in 2001 the number of classified government documents reportedly rose 18%).

77. Langley & Levine, *supra* note 33, at 45.

78. *Id.* at 20.



press because the informants are “members of a minority political or cultural group that relies heavily on the media to propagate its views . . . .”<sup>79</sup> Evidently, *Branzburg* did not expressly consider the deterrent effects that its rule may have on the relationship between government-agent informants and reporters.

Applying the proposed rule to the *Miller* case presents a unique challenge. It appears that the press’s publication of Valerie Plame’s identity did in fact impair our government’s national security efforts because it both crippled Plame’s ability to carry out any future covert operations and allowed foreign intelligence services to learn how the CIA operates by tracing Plame’s steps and contacts in their countries.<sup>80</sup> In addition, the leak may well have put Plame’s life in jeopardy, as well as the lives of her friends and associates.<sup>81</sup> In sum, the public value of the information was minimal compared to the harm that it caused.

However, Judith Miller never actually published this information. This is a pertinent fact because it is widely understood within the political sphere of journalism that reporters routinely rely on off-the-record confidential disclosures as a means of ensuring that the reporter has sufficient background information to publish credible and accurate news.<sup>82</sup> Thus, a reporter’s privilege that does not absolutely protect the press’s ability to merely obtain, as opposed to publish, information from a confidential government-agent informant appears to be constitutionally deficient. As Judge Tatel stated in *Miller*, reporters’ interests mirror the public’s.<sup>83</sup> Accordingly, reporters should have the initial freedom to obtain confidential government information, and then to subsequently determine whether it is consistent with their duty to publish that information. In other words, unless and until the reporter affirmatively reports confidential government information which harms the public’s interest, he or she should have an absolute privilege to gather it.

Although Miller’s case is unique, there are several recent developments where a pure application of the proposed rule helps to demonstrate its propriety. For example, on November 2, 2005, the *Washington Post* published an article that reported that the United States government had set up secret CIA terrorist prison camps across the world in order to skirt America’s higher standards of prisoner treatment.<sup>84</sup> In response, the CIA formally referred the matter to the Justice Department, suggest-

ing that a government agent may have illegally disclosed classified information to the reporter.<sup>85</sup>

There was speculation that a grand jury would eventually issue a subpoena upon the reporter, Dana Priest, in an effort to learn the identity of the reporter’s confidential source.<sup>86</sup> If a grand jury were to issue a subpoena to Priest, the *Miller* decision has created a precedent that will severely hinder the reporter’s ability to assert a testimonial privilege.<sup>87</sup> However, under the proposed rule, the reporter’s privilege would protect Priest from compelled disclosure as long as the reporter could prove that disclosure of this information did not threaten the nation’s security.<sup>88</sup>

Similarly, in December 2005, the press reported that, in response to the September 11, 2001 terrorist attacks, President Bush authorized a secret surveillance program whereby the government has been intercepting telephone and email communications between the United States and Afghanistan.<sup>89</sup> The controversial aspect of Bush’s surveillance program, however, lies in the fact that the government is authorized to spy on people with suspected links to terrorist organizations without first getting a court’s approval. Due to this departure from traditional procedure, some security officials have questioned the legality of Bush’s program. In an address to the American people, Bush stated that information about his surveillance program was “improperly provided to news organizations.”<sup>90</sup> Thus, the government could conceivably attempt to compel disclosure of the reporters’ confidential source via a grand jury subpoena.

If the government did issue subpoenas, the proposed rule requires the press to comply with the subpoena unless they can show that publishing this information related to possible government misconduct and it did not injure the nation’s security. In this instance, it appears that the press’s reports do relate to possible government misconduct because it is unclear whether the President is authorized, under the Constitution, to implement this surveillance program. However, it is quite possible that publishing this information did threaten the security of

**Although Miller’s case is unique, there are several recent developments where a pure application of the proposed rule helps to demonstrate its propriety.**

79. *Branzburg*, 408 U.S. at 694-95 (emphasis added).

80. Nancy Gibbs, *The Rove Problem*, TIME MAGAZINE, July 25, 2005, at 25, 34.

81. *Miller*, 438 F.3d at 1178-79 (Tatel, J., concurring).

82. Vince Blasi, *The Newsman’s Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 234 (1971). In fact, it is quite likely that the Plame leak was an example of this practice. Gibbs, *supra* note 78, at 24, 25-32.

83. *Miller*, 397 F.3d at 1000 (Tatel, J., concurring).

84. DANA PRIEST, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

85. Wolf Blitzer, (CNN television broadcast Nov. 8, 2005) available at <http://transcripts.cnn.com/TRANSCRIPTS/0511/08/sitroom.04.ht>

ml. This is the same preliminary action that the CIA took before Judith Miller was eventually subpoenaed by a grand jury. *Id.*

86. *Id.*

87. *Id.*

88. The information relates to possible government misconduct because if the allegations are true then the government’s action may have violated United States law. Furthermore, disclosing this information does not appear to injure the public’s security because the location of the prisons was not revealed.

89. David E. Sanger, *In Address, Bush Says He Ordered Domestic Spying*, N.Y. TIMES, Dec. 18, 2005, at § 1.

90. *Id.* (quoting President Bush).

our nation because it “alert[ed] our enemies and endanger[ed] our country.”<sup>91</sup> Thus, even if President Bush’s tactics are unlawful, a court should compel disclosure of the reporter’s confidential government-agent informant only if it finds that, by publishing the information, the reporter actually hindered the government’s ability to prevent future terrorist attacks.

Unquestionably, in these modern-day examples, the confidential information was or may have been illegally disclosed. However, in these examples, the illegal disclosure arguably benefited the public because it contributed to the free flow of information about government conduct, which is required to protect the sanctity of our self-governing process. Therefore, in the *Miller* context, the scope of a reporter’s privilege directly implements First Amendment rights and the *Branzburg* reasons for strictly denying such a privilege must be examined in light of the reporter’s countervailing freedom of press.

### III. CONCLUSION

The First Amendment should provide reporters with a meaningful degree of protection from grand jury subpoenas that seek the identity of a confidential government-agent informant. This protection is necessary in order to ensure that the press can effectively gather and report information relating to government misconduct. In addition, a rule that provides reporters with a qualified privilege in the narrow context of “illegally disclosed confidential government information” would not conflict with either the rule or the reasoning in

*Branzburg*. On the contrary, it respects *Branzburg*’s desire to protect the public’s interest by promoting a grand jury’s ability to prosecute criminal activity. However, it recognizes that applying *Branzburg* in the context of *Miller* suppresses this precise concern because it inhibits the press’s ability to serve as the government’s watchdog. Finally, since *Branzburg* the press’s reliance on confidential government-agent informants has significantly increased and, therefore, *Branzburg*’s refusal to extend the press’s First Amendment right to gather news should be reconsidered in the context of the *Miller* facts.



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91. *Id.* (quoting President Bush). But see Paul Farhi, *N.Y. Times Held Off Publishing Domestic-Eavesdropping Story*, PHILA. INQUIRER, December 18, 2005, at A22 (reporting that the *New York Times* purposely delayed publishing this story until it “satisfied itself

through more reporting that it could write the story without exposing ‘any intelligence-gathering methods or capabilities that are not already on the public record.’”).